

Staff Summary Report



Council Meeting Date: 12-13-07

Agenda Item Number: 5a

SUBJECT: Approval of a Stipulated Final Judgment and Settlement Agreement in City of Tempe v. Central Plaza, LLC, et al., CV2005-11501.

DOCUMENT NAME: 20071213pwjsm01 CITY ATTORNEY ADMINISTRATION (0501-03)

SUPPORTING DOCS: Yes.

COMMENTS: Staff is requesting approval of the attached Settlement Agreement for the condemnation action in City of Tempe v. Central Plaza, LLC, et al., CV2005-11501. The Settlement Agreement settles the condemnation litigation for all parties, sets forth the value of the condemned property at the price appraised by the City and acknowledges satisfaction by the parties of Article 4 of the development agreement between the City of Tempe and Bashas, Inc, recorded at the Maricopa County Recorder's Office at 2001-0122971, by extending cross-access rights across the City-owned park and ride lot to Central Plaza, L.L.C and Bashas.

PREPARED BY: Jyme Sue McLaren, Deputy Public Works Manager – LRT Division (350-8803)

REVIEWED BY: Glenn Kephart, Public Works Manager (350-8205)

LEGAL REVIEW BY: Andrew Ching, City Attorney (350-8612)

FISCAL NOTE: NA

RECOMMENDATION: Staff recommends approval of Settlement Agreement.

ADDITIONAL INFO: None.

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made and entered into as of the _____ day of _____, 2007 by and among Central Plaza, L.L.C., an Arizona limited liability company ("Central Plaza"), Bashas', Inc., an Arizona corporation ("Bashas'") and the City of Tempe, a municipal corporation ("City").

RECITALS

A. Central Plaza owns a commercial shopping center known as Apache Central Center on Apache Boulevard in Tempe, Arizona (the "Center"). The City currently is engaged in construction of the light rail project along Apache Boulevard adjacent to the Center.

B. Bashas' is a lessee in the Center pursuant to a Lease dated December 29, 2000 ("Lease").

C. In 2001, Bashas' and the City entered into a Development Agreement recorded at 2001-0122971 containing certain guarantees relating to access to the Center in connection with the future anticipated construction of the light rail project.

D. On July 19, 2005, the City filed a Complaint in Maricopa County Superior Court against Central Plaza and Bashas', among other parties, to condemn a portion of the Center for the light rail project ("Litigation").

E. Since the filing of the Litigation, the City has acquired property adjacent to the Center to the west ("Adjacent Property") for a park and ride facility that will be used for the light rail project, and the City has agreed to provide ingress and egress access to the Center through and across the Adjacent Property in satisfaction of the City's obligations under the Development Agreement with Bashas'.

F. The parties hereto now desire to acknowledge fulfillment of Tempe's obligations in the Development Agreement, Article 4 and to settle and compromise the Litigation and avoid the costs and risks of any further litigation based on the facts alleged therein.

AGREEMENT

NOW, THEREFORE, in consideration for the parties entering into this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties acknowledge and expressly agree as follows:

1. Within thirty (30) days of execution of the Stipulated Judgment in Condemnation by the court in the Litigation, the City will pay \$62,600, plus statutory interest, to Central Plaza for the fair market value of the property condemned in the Litigation. Upon payment, the parties will file a Satisfaction of Judgment and Final Order of Condemnation.

2. The City will develop the Adjacent Property as a park and ride facility with ingress and egress access to the Center from Dorsey Road ("Access") pursuant to the plans

attached as **Exhibit 1**. The City reserves the right to relocate and/or modify the Access to other portions of the Adjacent Property upon redevelopment of said property, at the City's sole cost and expense. Central Plaza and Bashas' shall have the right of reasonable approval of plans to relocate and/or modify the Access, including but not limited to the location, width and entryway of the relocated or modified Access, within 45 days from receipt of the plans from the City, otherwise said plans shall be deemed approved. The City will install and maintain a traffic light at Dorsey Road and Apache Boulevard, which will at all times permit left hand turns onto Dorsey Road from Apache Boulevard. The City also will perform work in the Center as described in the document entitled Scope of Work attached as **Exhibit 2**. The City will complete the improvements no later than the completion of construction of the light rail project, currently scheduled for completion by December, 2008.

3. Bashas' will accept development pursuant to Exhibits 1 and 2, and will accept the traffic light with a left hand turn at Dorsey Road and Apache Boulevard, as conformance with and satisfaction of the Development Agreement, Article 4 and the Lease.

4. In consideration of the promises contained herein, Central Plaza and Bashas' hereby release and forever discharge the City, its past, present and future Councilmembers, attorneys, agents, servants, representatives, employees, departments and divisions, and all named defendants in the Litigation, from any and all past or present claims, demands, obligations, actions, causes of action, rights, damages, costs, legal fees, expenses, penalties and compensation of any nature whatsoever, known or unknown, which Central Plaza and Bashas' now have arising out of the acts, omissions, events, circumstances and transactions which are the subject of the Litigation or Article 4 of the Development Agreement. This Agreement is not intended as a release of any claims Central Plaza and Bashas' may have against the City arising out of the terms of this Agreement.

5. Central Plaza warrants that it is the sole owner of the Property and has not assigned any claims to the Litigation.

6. This Agreement shall be recorded by the City in the Official Records of Maricopa County, Arizona within ten (10) calendar days after execution. This Agreement may be amended or cancelled, in whole or in part and with respect to all or any portion of the Property, only with the mutual written consent of all parties.

7. The rights and obligations of the parties to this Agreement and Article 4 of the Development Agreement shall terminate forty (40) years from the date of the execution of this Agreement.

8. In the event any action is filed to enforce or defend this Agreement, the prevailing party in such action shall be entitled to, in addition to any other damages or relief available to them, an award of reasonable attorneys' fees and costs incurred in connection with such action, including in any bankruptcy or appellate proceeding.

9. In executing this Agreement, each party hereto acknowledges that it has consulted with and had the advice of counsel of its own choosing in negotiations for and preparation of this Agreement and was fully advised by counsel with respect to all rights which

are affected by this Agreement.

10. For purposes of construction and interpretation, this Agreement shall be deemed to have been jointly drafted by counsel for the parties and ambiguities, if any, shall not be construed for or against any party.

11. This Agreement is made and entered into in the State of Arizona and shall in all respects be interpreted, enforced, and governed under the laws of the State of Arizona. Any dispute with respect to the performance or enforceability of this Agreement shall be filed in the Superior Court for the County of Maricopa, State of Arizona.

12. This is the entire Agreement among the parties with respect to the subject matter hereof. It includes all of the terms, promises, representations and understandings made by the parties, and it supersedes any earlier written or oral understandings or agreements between the parties concerning this Agreement or settlement of the Litigation. No party hereto nor its respective attorneys or advisors or agents have made any promise, representation or warranty, whether expressed, implied or statutory, not contained herein, concerning the subject matter of this Agreement in order to induce the parties hereto to execute this Agreement, and each signatory acknowledges that such party has not executed this instrument in reliance on any promise, representation or warranty not contained herein.

13. Each party to this Agreement certifies that it has read all of this Agreement and fully understands all of the same.

14. Each party to this Agreement will cooperate reasonably and in good faith and diligently perform any further acts, deeds and things and execute and deliver any documents that may from time to time be reasonably necessary or otherwise reasonably required to consummate, evidence, confirm and/or carry out the intent and provisions of this Agreement, all without undue delay or expense and without further consideration.

15. This Agreement may be executed in counterparts and via facsimile with the same force and effect as if executed in one complete document. Any party executing this Agreement by facsimile shall provide the other party with an originally executed Agreement within five days.

16. If any clause or provision of this Agreement is held to be illegal, invalid or unenforceable under any law applicable to the terms hereof, then the remainder of this Agreement shall not be affected thereby.

17. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective representatives, successors, affiliates, directors, officers, members and assigns; provided, however, the foregoing shall not be deemed or construed to confer any right, title, benefit, cause of action or remedy upon any person or entity not a party hereto, which such party would not nor did not otherwise possess.

18. By executing this Agreement, the City warrants that this Agreement has been duly and lawfully approved at a properly noticed meeting of the City Council of the City of Tempe.

19. The waiver by any party of any right granted to it hereunder shall not be deemed a waiver of any other right.

20. This Agreement is subject to the cancellation provisions of A.R.S. § 38-511, but the parties hereto do not believe any such reasons for cancellation of this Agreement pursuant to said statute now exist.

21. This Agreement shall be effective upon the execution by the parties hereto;

22. The Recitals set forth above and exhibits attached hereto are acknowledged by the parties to be true and correct and are incorporated herein by this reference.

IN WITNESS WHEREOF, Central Plaza, Bashas' and the City have executed this Agreement.

CENTRAL PLAZA, L.L.C., an Arizona limited liability company

By: _____
Name: _____
Title: _____

BASHAS', INC., an Arizona corporation

By: _____
Name: _____
Title: _____

CITY OF TEMPE

By: _____
Hugh Hallman, Mayor

ATTEST:

City Clerk

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2007, by _____, who represented himself to be the _____ of Central Plaza, L.L.C.

Notary Public

My Commission Expires:

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2007, by _____, who represented himself to be the _____ of Bashas' Inc.

Notary Public

My Commission Expires:

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2007, by Hugh Hallman, Mayor of the City of Tempe, for and on behalf of the City of Tempe.

Notary Public

My Commission Expires:

APPROVED AS TO FORM:

Jeffrey D. Gross
Attorney for Central Plaza, L.L.C

Andrew Abraham
Attorney for Bashas' Inc.

C. Brad Woodford
Attorney for City of Tempe

Exhibit 1 **Plans and Specifications**

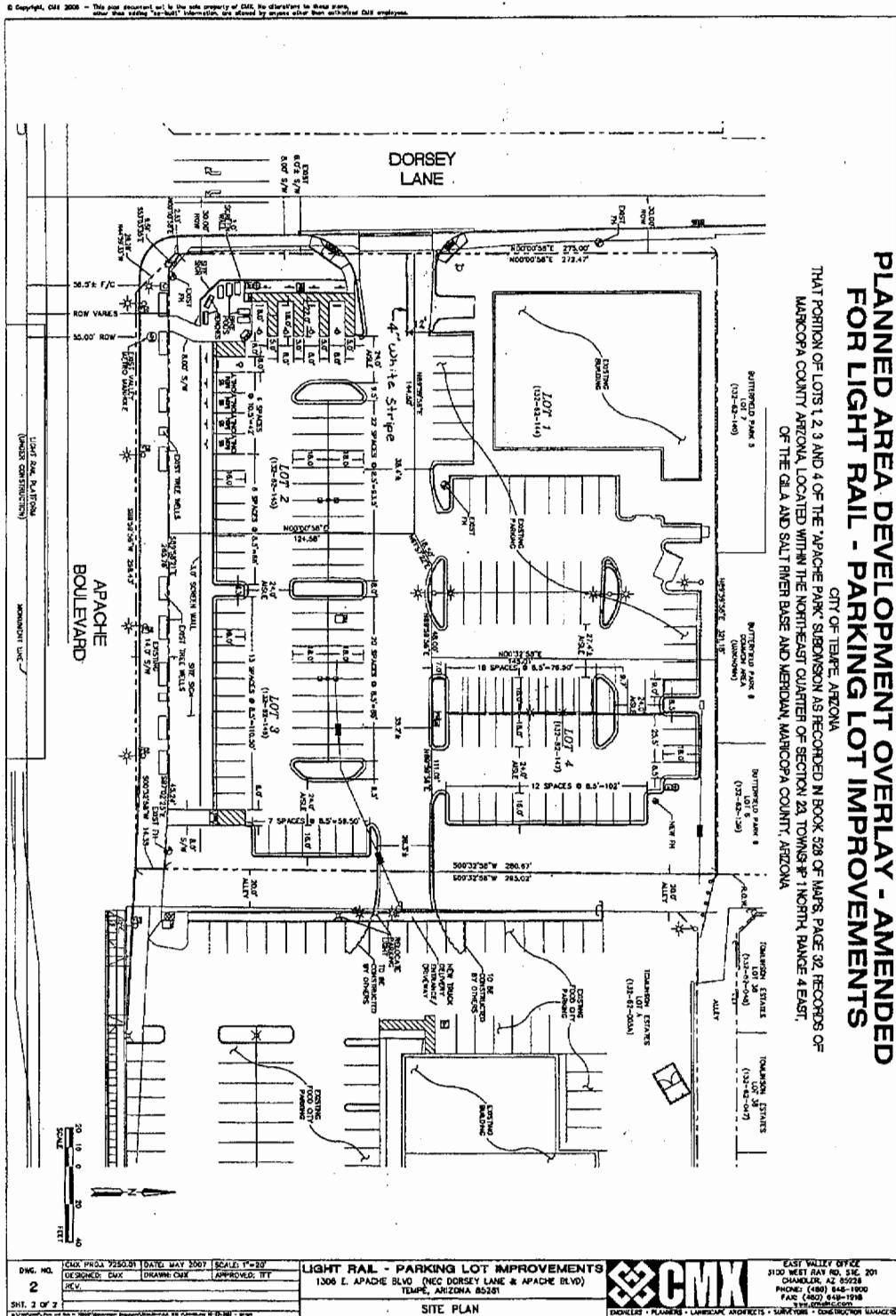


Exhibit 2

Scope of Work

Drives

1. Install new drive/approach on the West side of property from Adjacent Property
 - a. Saw-cut and remove existing curbing
 - b. Re-grade driveway as needed
 - c. Relocate light pole and utility pole
2. Remove drives (1 ea) on the Southeast corner of the property at the Apache and Gary intersection
3. Remove asphalt and knock down grade at the old east drive on the Southeast corner of Apache and Gary to be uniform with the parking lot and extend existing handrail to match, if necessary

Islands

1. Add new islands on each side of the new West side drive.
2. Remove & relocate islands (2 ea) at West side of main driveway from Apache 10-15 feet to create new parking spaces
 - a. Saw-cut and remove existing curbing
 - b. Relocate (3) three palm trees
 - c. Relocate light pole
 - d. Remove and replace existing sage bushes
3. Re-install island at East side of main drive from Apache to include pedestrian walkway
4. Trench and install new landscaping with irrigation for all islands
5. Replace all landscape irrigation pipes damaged by construction
6. Expand existing islands in parking lot along Apache to length of parking spaces

Parking lot

1. Re-pave entire parking lot
2. Remove and replace (existing or damaged) wheel stops after overlay.
3. Re-stripe all spaces.

Sidewalk

1. Install concrete sidewalk at corner of Apache and Gary across old driveways
2. Replace any damaged curb sections throughout site.
3. Add pedestrian walkway at east end of main drive from Apache to Food City

For illustration purposes only, and without limiting the above, the Scope of Work is in or near the areas circled on the attached site plan of the Center.